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U.S. DISTRICT COURT  
NORTHERN DIST. OF TX  
FT. WORTH DIVISION

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**UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF TEXAS  
FORT WORTH DIVISION**

16 FLEXIBLE INNOVATIONS LTD., a  
Texas Limited Partnership,

17 Plaintiff,

18 vs.

19 IDEAMAX, a California General  
20 Partnership, EUGENE LEE, and  
21 AEKYUNG LEE,

22 Defendants.

Case No. 4:14-cv-093-A

**DEFENDANTS IDEAMAX, EUGENE  
LEE, AND AEKYUNG LEE'S  
NOTICE OF MOTION AND MOTION  
TO DISMISS PLAINTIFF'S  
COMPLAINT FOR FAILURE TO  
STATE A CLAIM AND MOTION  
FOR MORE DEFINITE STATEMENT**

Court Room: 401  
Judge: Hon. John McBryde

Complaint Filed: 2/11/2014

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1 **1.0 NOTICE OF MOTION**

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4 Defendants, IDEAMAX, EUGENE LEE AND AEKYUNG LEE, (collectively,  
5 “Defendants”) move under Federal Rule of Civil Procedure 12(b)(6) to dismiss this action  
6 for failure to state a claim upon which relief can be granted. Specifically, Defendants  
7 move to dismiss the first cause of action for “Breach of Contract,” the second cause of  
8 action for “False Marking,” the third cause of action for “Common Law Unfair  
9 Competition,” and the fourth cause of action for “Sanctions or Contempt for Violation of  
10 Court Order.” The Defendants further move under Federal Rule of Civil Procedure 12(e)  
11 for a more definite statement in the Complaint as it is vague and ambiguous. Fed. R. Civ.  
12 P. 9(b) requires that the fraud-related claims be pleaded with more specific factual  
13 allegations.  
14

15  
16 **2.0 INTRODUCTION**

17 Plaintiff, FLEXIBLE INNOVATIONS LTD. (“Plaintiff”) had sued Defendants  
18 previously before this same court. Specifically, Plaintiff filed a complaint on November  
19 30, 2012, against the same Defendants for counts of trademark infringement, Lanham Act  
20 unfair competition, and common law unfair competition (the “previous litigation”).  
21 Defendants defaulted and attempted to vacate the default. The Court denied Defendants’  
22 motion and entered a final judgment and a permanent injunction precluding Defendants  
23 from certain conduct. The Court retained the ability to enforce the injunction. Plaintiff  
24 withdrew a motion for contempt against Defendants and filed the instant complaint on  
25 February 11, 2014, seeking the same relief that could have, and should have, been  
26 pursued by the withdrawn motion in the previous litigation. Plaintiff’s instant complaint  
27  
28

1 brings causes of action for breach of contract (alleged breach of a confidential settlement  
2 agreement resolving the previous litigation), false marking (alleged false claims of patent  
3 coverage that were the subject of the withdrawn motion for contempt from the previous  
4 litigation), common law unfair competition (reviving the same cause of action from the  
5 previous litigation), and “sanctions or contempt for violation of court order” (seeking the  
6 relief that was sought in the withdrawn motion for contempt from the previous litigation).  
7

8  
9 However, Plaintiff failed to plead full performance of the contract, such as  
10 releasing Defendants from all allegations of prior wrongdoing, and directly breaching the  
11 contract by putting forth causes of action for false marking and unfair competition which  
12 were already resolved by a final judgment in the previous litigation. Plaintiff failed to  
13 plead specific facts with particularity as required by Fed. R. Civ. P. 9(b) to support the  
14 false marking claim and the unfair competition claim. Plaintiff’s complaint also fails to  
15 specify the damages claimed for the false marking, unfair competition, and “sanctions or  
16 contempt” causes of action. Therefore, Plaintiff’s instant complaint should be dismissed  
17 for failure to state a claim and under legal principles of res judicata, claim preclusion, and  
18 issue preclusion.  
19  
20

21 **3.0 THE COMPLAINT PURSUES CAUSES OF ACTION RELATING TO THE**  
22 **PREVIOUS LITIGATION THAT ENDED IN A FINAL JUDGMENT AND A**  
23 **PERMANENT INJUNCTION**

24 On June 26, 2013, this Court entered a final judgment against Defendants stating  
25 that “all claims and causes of action asserted by any party thereto, be, and are hereby,  
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28

1 dismissed with prejudice.”<sup>1</sup> The Court’s final judgment indicated that the injunctive relief  
 2 ordered on March 7, 2013, May 28, 2013, and on June 26, 2013 “remain in full force and  
 3 effect.”<sup>2</sup> If Plaintiff claims violations of any injunctions, the proper procedure is to make  
 4 a motion in the previous litigation and not file the new, separate instant complaint or add  
 5 other causes of action that were dismissed with prejudice. In fact, Plaintiff did file a  
 6 report with this Court on November 1, 2013 alleging contempt for “false and misleading  
 7 advertising” and “patent mismarking.”<sup>3</sup> The Plaintiff elected not to proceed with the  
 8 contempt proceedings and indicated a possibility of bringing “the false advertising and  
 9 patent mismarking issues in future proceedings.”<sup>4</sup> Plaintiff’s statement does not indicate  
 10 that “future proceedings” included filing a new lawsuit after having the previous  
 11 litigation dismissed with prejudice. Based on Plaintiff’s statement, the Court denied the  
 12 relief then sought.<sup>5</sup> The Court’s order did not invite Plaintiff to file a new lawsuit.

#### 16 **4.0 THE FIRST CAUSE OF ACTION FOR BREACH OF A CONTRACT FAILS** 17 **DUE TO PLAINTIFF’S LACK OF FULL PERFORMANCE**

18 To prevail on a breach of contract claim under Texas law, a plaintiff must show:

- 19 “(1) the existence of a valid contract;
- 20 (2) performance or tendered performance by the plaintiff;
- 21 (3) breach of the contract by the defendant; and

23 <sup>1</sup> Final Judgment, Dkt. No. 100, Case No. 4:12-cv-00856-A, June 26, 2013, p.1.

24 <sup>2</sup> See, *id.*, pp. 1-2.

25 <sup>3</sup> See, Plaintiff’s Statement Regarding Contempt Proceedings, Dkt. No. 117, Case No. 4:12-cv-00856-A,  
 26 November 1, 2013.

27 <sup>4</sup> See, Plaintiff’s Report re Noncompliance with Notice of Steps to Take to Comply with Court’s Orders,  
 28 Dkt. No. 123, Case No. 4:12-cv-00856-A, December 3, 2013.

<sup>5</sup> See, Order, Dkt. No. 124, Case No. 4:12-cv-00856-A, December 3, 2013.

1 (4) damages sustained by the plaintiff as a result of the breach.”<sup>6</sup>

2 Plaintiff’s complaint alleges that Plaintiff “has fully performed by releasing  
3 Defendants from all allegations of prior wrongdoing, except as otherwise specifically  
4 agreed and previously ordered by this Court.”<sup>7</sup> However, Plaintiff’s complaint  
5 demonstrates that Plaintiff has not indeed “fully performed.” Specifically, Plaintiff’s  
6 causes of action for false marking and common law unfair competition are directed to  
7 “prior wrongdoing” that was already resolved by a final judgment and injunction as  
8 detailed herein, *supra*. The complaint does not indicate explicitly whether the agreement  
9 is alleged to be void or other reason to excuse Plaintiff’s non-performance. Thus, Plaintiff  
10 should be ordered to provide a more definite pleading if the breach of contract claim is not  
11 dismissed with prejudice.  
12  
13  
14

15 **5.0 THE SECOND CAUSE OF ACTION FOR FALSE MARKING FAILS TO**  
16 **STATE A CLAIM AND FAILS TO ASSERT FACTS WITH SUFFICIENT**  
17 **PARTICULARITY UNDER FED. R. CIV. P. 9(b)**

18 **5.1 THE SECOND CAUSE OF ACTION FOR FALSE MARKING FAILS TO**  
19 **STATE A CLAIM FOR THE CITED U.S. PATENT NUMBER 6,613,382 B1**

20 The complaint alleges that the Defendants have no right to claim patent protection  
21 for products that are not covered by U.S. Patent No. 6,613,382 B1. However, Defendant  
22 Eugene Lee is the patentee of record for U.S. Patent No. D691,138 S, a design patent to a  
23 “Stylus Pen For A Mobile Device” which issued on October 8, 2013 (Exhibit A to  
24

25  
26 <sup>6</sup> *Smith Int’l, inc. v. Egle Group, LLC*, 490 F.3d 380, 387 (5<sup>th</sup> Cir. 2007)(citing *Valero Mktg. & Supply Co. v. Kalama Int’l, L.L.C.*, 51 S.W.3d 345, 351 (Tex. App. – Houston [1<sup>st</sup> Dist.] 2001); see also *Sport Supply Group, Inc. v. Columbia Cas. Co.*, 335 F.3d 453, 465 (5<sup>th</sup> Cir. 2003); *Manns-Rice v. Chase Home Fin. LLC*, No. 4:11-cv-425-A, 2012 WL 2674551, at \*4 (N.D. Tex., July 5, 2012)(McBryde, J.).  
27  
28



1 Declaration of Frederic M. Douglas). This recently issued design patent contradicts  
2 Plaintiff's allegation that Defendants are falsely marking the products advertised online at  
3 [http://www.microclean.net/e-stylus\\_microclean.html](http://www.microclean.net/e-stylus_microclean.html), which Plaintiff attaches to its  
4 complaint in Exhibit A thereto, marked with an alleged date of February 10, 2014. For  
5 example, the statement, "Trust the original genuinely United States Patented  
6 manufacturer for 10 years" is not identical to any of the prohibited language from a prior  
7 injunction, which did not address Defendants' stylus pen for a mobile device. If  
8 Defendants make reference to the length of time that they have been manufacturers of  
9 products and that they have maintained a patent for at least ten years, such a statement is  
10 not false and not intended to deceive the public or unfairly affect Plaintiff.  
11

12  
13  
14 Plaintiff alleges that Defendants cannot use language that indicates that  
15 Defendants have a pending patent application. As seen in U.S. Patent Application  
16 Publication No. 2013/0067671 A1, published on March 21, 2013 (Exhibit B to the  
17 Declaration of Frederic M. Douglas), listing Defendant Eugene Lee as the inventor under  
18 his alternative name, Eunchang Lee. This pending patent application covers "adhesive  
19 layers"<sup>8</sup> and "gels."<sup>9</sup> Thus, Defendants have not falsely marked their advertisements as  
20 alleged in the complaint.  
21  
22  
23  
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25

26 <sup>7</sup> Complaint, Dkt. No. 1, Feb. 11, 2014, paragraph 13.

27 <sup>8</sup> See Abstract.

28 <sup>9</sup> See Paragraphs [0019] and [0043].

**5.2 THE SECOND CAUSE OF ACTION FOR FALSE MARKING MUST BE  
PLED WITH THE PARTICULARITY REQUIREMENT OF FED. R. Civ. P. 9(b)**

The pleading requirement that claims of fraud must be pled with particularity has been held to apply to false marking claims.<sup>10</sup> Fed R. Civ. P. 9(b)'s particularity requirement applies to false marking claims.<sup>11</sup>

Plaintiff must distinguish among those it sues and "enlighten each defendant as to his or her part in the alleged fraud."<sup>12</sup> Plaintiff may not merely push forward conclusory allegations<sup>13</sup> that do not allege intent to deceive<sup>14</sup> and only state as to damages that "the harm to Plaintiff FI is difficult to quantify."<sup>15</sup> An honest mistake that results in mismarking a product does not trigger liability.<sup>16</sup> Instead, Fed. Rule of Civ. P. 9(b) is only satisfied when Plaintiff's Complaint "state[s] the time, place, and nature of the misleading statements, misrepresentations and specific acts of fraud."<sup>17</sup> Here, Plaintiff did not take heed of the requirement that, at a minimum, a plaintiff must set forth in the complaint the "who, what, when, where, and how" of any alleged fraud.<sup>18</sup>

<sup>10</sup> See, e.g., *Juniper Networks v. Shipley*, 2009 WL 1381873 (N.D. Cal. May 14, 2009).

<sup>11</sup> *In re BP Lubricants USA, Inc.*, 637 F.3d 1307, 1311 (Fed. Cir. 2011).

<sup>12</sup> *Bruns v. Ledbetter*, 583 F.Supp. 1050, 1052 (S.D. Cal. 1984).

<sup>13</sup> *Semeran v. Weidner*, 780 F.2d 727, 731 (9<sup>th</sup> Cir. 1985).

<sup>14</sup> See, *Clontech Labs., Inc. v. Invitrogen Corp.*, 406 F.3d 1347, 1355 (Fed. Cir. 2005)(a patent holder that reasonably and in good faith believes that articles were properly marked is not subject to liability under 35 U.S.C. § 292); see also, 35 U.S.C. § 292(a) ("... for the purpose of deceiving the public").

<sup>15</sup> See, Complaint, paragraph 19.

<sup>16</sup> See, *Clontech Labs, Inc.*, 406 F.3d at 1352.

<sup>17</sup> *In re Gupta Corp. Sec. Litig.*, 900 F.Supp. 1217, 1228 (N.D. Cal. 1994).

<sup>18</sup> *United States ex rel. Williams v. Bell Helicopter Textron*, 417 F.3d 450, 453 (5<sup>th</sup> Cir. 2005)(internal

1 Plaintiff has not complied with Fed. R. Civ. P. 9(b) and the second and third causes  
 2 of action should be dismissed under Fed. R. Civ. P. 12(b)(6).  
 3

4 Courts have also recognized the utility of Fed. R. Civ. P. 12(e).<sup>19</sup> A defendant faced  
 5 with a complaint like Plaintiff's instant Complaint is not expected to frame a responsive  
 6 pleading; rather the defendant "is expected to move the court, pursuant to Rule 12(e), to  
 7 require the plaintiff to file a more definite statement."<sup>20</sup>  
 8

9  
 10 **6.0 THE THIRD CAUSE OF ACTION FOR COMMON LAW UNFAIR**  
 11 **COMPETITION FAILS TO ALLEGE SPECIFIC FACTS REQUIRED TO**  
 12 **SUPPORT THE CAUSE OF ACTION**

13 Plaintiff's cause of action for unfair competition fails to recite the minimum  
 14 elements of a prima facie claim for common law unfair competition. The complaint also  
 15 fails to plead common law unfair competition with sufficient particularity as required for  
 16 causes of action related to fraud under Fed. R. Civ. P. 9(b).  
 17

18 Instead, Plaintiff merely states that Defendants have engaged in "violations of  
 19 statutory obligations and/or trade disparagement" with no more details.<sup>21</sup> Plaintiff  
 20

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21 quotation marks omitted). *See also, Vess v. Civa-Geigy Corp. USA*, 317 F.3d 1097, 1106 (9<sup>th</sup> Cir. 2003)  
 22 ("[a]llegations of fraud must be accompanied by 'the who, what, when, where, and how' of the misconduct  
 charged.") (quoting *Cooper v. Pickett*, 137 F.3d 616, 627 (9<sup>th</sup> Cir. 1997)).

23 <sup>19</sup> *See, Cates v. Int'l Tel. & Tel. Corp.*, 756 F.2d 1161, 1180 (5<sup>th</sup> Cir. 1985). In *Wagner v. First Horizon*  
 24 *Pharm. Corp.*, 464 F.3d 1273, 1280 (11<sup>th</sup> Cir. 2006), the Eleventh Circuit upheld the district court's "proper  
 25 conclusions that the complaint was a shotgun pleading and that plaintiffs' failed to connect their causes of  
 action to the facts alleged," and determined the proper remedy was to order repleading under Fed.R.Civ.P.  
 12(e) to clarify fraud based claims and obtain the required degree of factual particularity.

26 <sup>20</sup> *See, Anderson v. District Board of Trustees of Central Florida Community College*, 77 F.3d 364, 366  
 27 (11<sup>th</sup> Cir. 1996).

28 <sup>21</sup> *See, Complaint*, paragraph 22.

1 explicitly invokes the fraud pleading requirements by alleging that the “Defendants’  
 2 actions have been actuated by fraud and/or malice.”<sup>22</sup>

3  
 4 Plaintiff fails to specify which statute(s) Defendants violated or the who, what,  
 5 when, where of “trade disparagement.” One court has held that no unfair competition  
 6 claim lies when there was neither a breach of confidence nor a palming-off of a person’s  
 7 goods as those of another person’s.<sup>23</sup> Texas common law unfair competition is an  
 8 umbrella describing various torts,<sup>24</sup> including passing off, trademark infringement,<sup>25</sup>  
 9 common law misappropriation,<sup>26</sup> and misappropriation of confidential information or  
 10 trade secrets.<sup>27</sup> Whatever claim that Plaintiff alleges, Plaintiff needs to plead the claim  
 11 with particularity, which it has not done to date.  
 12

13  
 14 **7.0 THE FOURTH CAUSE OF ACTION FOR SANCTIONS OR CONTEMPT**  
 15 **FAILS TO PROPERLY CHARACTERIZE THE INJUNCTION FROM THE**  
 16 **PREVIOUS LITIGATION**

17 Plaintiff tells part of the truth when it states that the Court’s injunctive orders from  
 18 the previous litigation enjoined the Defendants from using the specific phrase “Trust the  
 19 Original Genuinely United States Patented Manufacturer.” The full subject matter of the  
 20 enjoined activity, as shown in the Plaintiff’s own Exhibits B and D to the Complaint,

21 <sup>22</sup> See, *Id.*, paragraph 23.

22 <sup>23</sup> *Furr’s, Inc. v. United Specialty Adver. Co.*, 385 S.W.2d 456, 460 (Civ. App. – El Paso 1963).

23 <sup>24</sup> See, *U.S. Sporting Prods., Inc. v. Johnny Stewart Game Calls, Inc.*, 865 S.W.2d 214, 217 (Tex. App. –  
 24 Waco 1993)(*writ denied*)(“The law of unfair competition is the umbrella for all statutory and nonstatutory  
 25 causes of action arising out of business conduct which is contrary to honest practice in industrial or  
 26 commercial matters.”).

26 <sup>25</sup> *Douglas v. Taylor*, 497 S.W.2d 308, 310 (Civ. App. – Houston 1<sup>st</sup> Dist. 1972).

27 <sup>26</sup> *Chevron Chem. Co. v. Coluntary Purchasing Groups, Inc.*, 659 F.2d 695, 701 FN 8 (5<sup>th</sup> Cir. 1981).

28 <sup>27</sup> *Furr’s, Inc. v. United Specialty Adver. Co.*, 385 S.W.2d 456, 460 (Civ. App. – El Paso 1964).

1 refers to only language describing the cleaning qualities or cleaning characteristics related  
2 to Defendants' microfiber screen wipe products. The Court did not enjoin phrases  
3 describing other qualities of any products that are not microfiber screen wipe products.  
4 Thus, as shown in Exhibit A to the Complaint, there is no violation of this Court's  
5 injunctions if Defendants use any phrases to describe the E-Stylus MicroClean products,  
6 which are not subject to any injunction.

7  
8 **8.0 CONCLUSION**

9  
10 Defendants respectfully request that this Court dismiss the Complaint as to moving  
11 Defendants for failure to state a claim. Rule 9(b) commands that each and every  
12 Defendant be specifically advised of fraud-based allegations against the same Defendant.  
13 Instead, Plaintiff engages in indefinite pleading. All of Plaintiff's claims fail as explained  
14 above and the Complaint should be dismissed. In the alternative, Defendants move this  
15 Court pursuant to Rule 12(e) for a more definite statement of the claims.  
16

17  
18 Dated: March 6, 2014

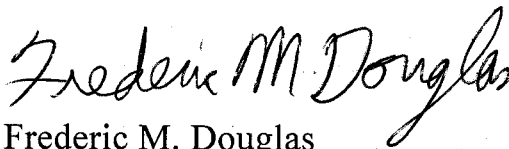
*Frederic M. Douglas*  
By: /s/ Frederic M. Douglas  
Frederic M. Douglas  
Attorney for Defendants  
IDEAMAX, EUGENE LEE,  
AND AEKYUNG LEE

**Certificate of Service**

I hereby certify that on March 6, 2014, I transmitted the foregoing documents

**DEFENDANTS IDEAMAX, EUGENE LEE, AND AEKYUNG LEE'S  
NOTICE OF MOTION AND MOTION TO DISMISS PLAINTIFF'S  
COMPLAINT FOR FAILURE TO STATE A CLAIM AND MOTION FOR  
MORE DEFINITE STATEMENT**

electronically in compliance with Local Rules, constituting electronic service upon  
counsel of record that have consented to electronic service. All other counsel of  
record or pro se parties were served with a true and correct copy of the foregoing  
by hand delivery, email, U.S. mail or facsimile transmission, on this the 6<sup>th</sup> day of  
March, 2014.

  
/s/ Frederic M. Douglas